UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE HON. JUDGE JOHN A. KRONSTADT, JUDGE PRESIDING

MS. J.P., et al.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 18-CV-06081-JAK
	)	
JEFFREY B. SESSIONS, et al.,	)	
	)	
Defendants.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, February 13, 2020

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Los Angeles, California; Thursday, February 13, 2020;

1:32 p.m.

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THE COURT: Item seven, CV-18-06081, Ms. J.P. v. Sessions.

Would you state your appearances, please, starting with plaintiffs' counsel.

MR. ROSENBAUM: Good afternoon, Your Honor. Mark Rosenbaum on behalf of plaintiffs from Public Counsel.

THE COURT: Good afternoon, Mr. Rosenbaum.

MR. KELLY: Good morning, Your Honor. Steven Patrick Kelly of Sidley Austin for plaintiffs.

THE COURT: Good afternoon, Mr. Kelly. I think it's afternoon by now.

MR. KELLY: Sorry, Your Honor.

MS. LALLY: Good afternoon, Your Honor. Amy Lally, Sidley Austin for the plaintiffs.

THE COURT: Good afternoon, Ms. Lally.

MS. SAVAGE Good afternoon, Your Honor. Amanda Savage, Public Counsel, also for plaintiff.

THE COURT: Good afternoon, Ms. Savage.

For the defendants.

MS. MURLEY: Good afternoon, Your Honor. Nicole Murley for the defendants.

MS. VICK: Good afternoon, Lindsey Vick for the

defendants.

THE COURT: All right. Good afternoon, Ms. Murley and Ms. Vick.

As a follow-up to your last status conference, I've received your joint report. I'm aware of the issues that remain.

Just a minute.

Are there any developments since the filing of the joint report?

MS. MURLEY: No, Your Honor.

THE COURT: The joint report includes a discussion about pending discovery and there's -- I don't think there's anything that I need to do in connection with that at this point. I recognize to the extent that there are discovery issues that aren't resolved informally, Judge Kim will handle them. And I know he's already been working with you.

I urge you to continue to do what you've done a lot in this matter, which is to work collaboratively and efficiently, but in terms of any substantive discussion or substantive ruling, there's no motion pending. And I'm not going to undertake to accept an oral motion to skip by the normal process.

Yes.

MR. KELLY: Your Honor, there is a motion for protective order pending.

THE COURT: Yes, I'll get to that. That was a different part of the report.

The second issue that's discussed in the report is the Seneca proposal, and I recognize there's certain subsidiary issues as well. The initial Seneca proposal was made, there was some disclosure about it, some commentary about it, and other further information was requested and another request was made.

But my view is that the proposed Seneca as an NGO, this appears to me to be their plan as it's presently formulated and as it may evolve -- I think is sufficient to accomplish the required mission here. And based on how things evolve or develop, issues may be presented, but I don't see an issue right now that warrants my intervention.

Is there something you wanted to add on that? Either side?

MS. MURLEY: No, Your Honor. No.

THE COURT: Now, there was some commentary as I mentioned with respect to disclosure about the Seneca report before it was finalized. Do you recall that?

MS. MURLEY: Yes. So it is still not a finalized proposal or contract. And so from the Government's perspective, it was a premature disclosure of the Government's procurement plan, so that was the point that we were making.

THE COURT: No, I understand. And I think, again, work collaboratively, which, as I say, you've done a lot of, so I think you need to continue doing that.

One of the issues that is presented with respect to the Seneca report in general is the class notice. On page eight of the report -- well, the plaintiff is proposing oral notice and affirmative contacts with members of the released subclass. The Seneca proposal is different.

I think that to the extent that the plaintiffs conclude that some supplemental notice or more of a notice or additional efforts to provide notice is appropriate, I think that's something with which you could communicate to Seneca about. But I don't think that it's -- I don't think I'm persuaded that something other than -- the general description by Seneca of what efforts it will make and undertake to locate and identify and communicate with class members warrants a different order at this time.

So again -- I mean, we've got the released subclass and the custody subclass. And with respect to the custody subclass, again I think what's being proposed is a reasonable effort to provide notice in terms of posting it and communicating it.

I'm mindful that the plaintiffs have expressed concern that members of the custody subclass may feel concerned about communicating with those who they think may

have been part of the process that led to their being detained and/or separated from their children, but I don't -- I'm just not persuaded that -- first, there's no evidence that it's exactly the same people; but second, I think that the type of notice that is contemplated would be sufficient.

And, once again, I don't think there's anything that would preclude the plaintiffs from requesting supplemental written communications or providing it, but I'm not persuaded, at least tentatively, that the general notice process that's described is inadequate.

But, once again, if -- and I recognize the timeline here is a relatively long one in light of all the efforts that have been made in connection with this case in general -- if the evidence later shows why this isn't sufficient, I could review it then.

Let me just go through these and then we can talk about them. In terms of services to the custody subclass, again I think that -- I think that there isn't at this point a sufficient basis for me to conclude that the services that would be made available to the custody subclass members are insufficient.

Those in custody in various places within different federal systems who need medical treatment are provided with that, and here the provider -- the federal

agency with responsibility for managing the care to be provided to the custody subclass should be -- is obligated to do that, but I don't think an order at this point is warranted that requires a particular third party or nonparty, excuse me, provide the services or that the services be provided outside the facility.

I think that, as I say, there's a process that applies generally within the federal system to those who need medical attention, and I expect it would be followed here.

And again, I'll keep going and I'll hear from you on these issues.

There's then been an issue about whether if a separation is determined appropriate -- before a separation of a parent and minor is appropriate whether hearing should be -- is warranted, which is what I stated in the original order.

When I -- in terms of separation of a parent and a minor, of course, there's different law that has considered those kinds of issues. It can be considered in terms of, for example, under the very state laws the termination of parental rights, which is a very significant action, and other issues about potentially separating minors from their parents. And it was somewhat in that more permanent context that I think that the concept of a hearing was adopted.

In light of the briefing that's been submitted, I'm presently of the view that it's not -- a hearing would not be required. I know Judge Sabraw has written about this in a somewhat different context, but again it's a question about whether there's a basis to conclude that a determination that a parent or adult presents a risk to a child if they are together is something that could reasonably be made by those with responsibility for making those decisions.

I think what we discussed at the last hearing was whether it would be appropriate to expect that the adult would be given at least a reasonable opportunity to present or provide a response to a decision that's being considered as to whether the parents should be separated from the parent's child. And I think that's a different thing than a hearing.

The concept being that in making a reasonable decision, the person in charge of that decision within the federal agency would be expected to gather -- reasonably gather available information in order to make that decision.

And I think potentially crafting that language shouldn't, I don't think, have a material effect on the decision-making process. In that, I would expect that that decision maker would make reasonable efforts to obtain that input where appropriate. If you follow me.

And that doesn't mean a hearing. Hypothetically, for example, if a decision is being made that it's appropriate to separate a parent from a child based on information that's been provided that the parent has been abusive to the child, could that information -- could the parent be given an opportunity to respond? Can information from the parent be elicited?

MS. MURLEY: So there's a few points, I'd like to make with regard to this issue. First, when this issue arose in the first status report in November 26, the question from defendants was whether the Court intentionally included the language "absent a determination and a hearing" because in other places it was sort of --

THE COURT: Slow down.

MS. MURLEY: Sorry.

-- in other places in the order, the Court suggested that it was mirroring what had been done in *Ms. L.* So to the extent the Government is just seeking whether the Court meant for that language or did not, because those individuals -- the hearing is not part of the way we identify those individuals, it's a little bit -- it's more burdensome for the Government to have to identify a second set of individuals for this case. The class here is broader. So it's -- the question is posed in the context of who gets the preliminary injunctive relief and who does not.

With regard to whether or not there's a process in place in CBP, those issues are squarely in front of the *Ms. L* court, and those are issues that are litigated there. The Court's decision on the first-to-file rule made clear that the constitutionality of the separation are not part of this case.

I will say, as counsel of record in *Ms. L*, that there is a process in place. The parent is notified of the basis for the separation and given a tear sheet which has contact information for them if they wish to present evidence contrary to that.

The nature of things in border patrol is that it's a short-term processing hold so it's not where the ultimate in custody detention takes place. So once a border patrol agent identifies that there's a problem, say, with the fitness or sees a fitness or danger or we have this issue of health, the parent then becomes -- there's not a parent present to take care or custody of the child under the Trafficking Victims Protection Reauthorization Act and that child by law becomes an unaccompanied alien child who then goes to ORR custody.

And we would say that the Office of Refugee Resettlement, who is given the statutory authority to make determinations about the child, is the agency and the best place to evaluate the parent.

So to answer Your Honor's question, I think there is a plan in place. We would say that there is a plan in place, it's part of another case, and so it's not needed here. And it would create added confusion to create two standards for what happens at the border.

THE COURT: Let me back up a step. I'll hear from the plaintiffs. As I've stated, the concern that I have is what you've been addressing. And that is whether the parent would have an opportunity to respond. And you just mentioned in the context of step one, typical step one, the parent would be given notice and would be given a tear sheet which the parent could complete and respond which is exactly the sort of thing I had in mind.

You then stated that, to the extent that a child is placed under the supervision of ORR, you said ORR would be in a very good position to make a similar determination. But what I didn't quite hear was if a child is -- will a determination have been made prior to a child being moved to ORR in which the parent had the opportunity to respond?

MS. MURLEY: No, Your Honor. The opportunity happens when the parent then gets transferred to ICE custody and there's an e-mail and a process to contact ICE because it's a very short process. CBP agents they process an individual. When an individual is apprehended, they come into custody and it's determined: Do we have to detain you?

If so, where are you detained? And then the individuals go to ICE custody. An adult without a child will go straight to ICE custody.

THE COURT: My question is with respect to members of the subclasses in this case if the term -- are they -- are all of them given that same opportunity that you've described at some point in the process to respond to a decision or a potential decision about whether they should remain separated from or will be separated from their child?

MS. MURLEY: Yes, the process is the same. And before a child is separated, it goes -- there's an internal review that happens in CBP so that the local -- it's my understanding that the local OCC office signs off on it. So there is a process in place.

THE COURT: Now, are both processes addressed specifically in the *Ms. L* case?

MS. MURLEY: Yes, Your Honor.

THE COURT: In an order?

MS. MURLEY: Yes. It's the order that's cited to -- the recent order in this case.

THE COURT: Okay. Is there a reason why the order here couldn't incorporate that or refer to that, so it's clear that the members of the class and the subclass are included within that same relief?

In other words, in order to avoid confusion as you

mentioned earlier about what the obligations are, could that be adopted in that fashion?

MS. MURLEY: The Court's order in *Ms. L* found -- Judge Sabraw found that the Government's process that's in place was sufficient, and he was happy with the process that was in place. If this Court were to reference that --

THE COURT: Yes.

MS. MURLEY: -- I think we would be okay with it. What we don't want is two separate --

THE COURT: I understand. My view is that so long as the parents are given an opportunity to provide input on this decision in a reasonable manner, I think that would be sufficient. And in order to avoid different standards and potential confusion, I think it can be the same standard that's been adopted in *Ms. L*. But I think we would need some language about that just to make that clear. I wouldn't expect to be too challenging.

MS. MURLEY: Yes, Your Honor. We can --

THE COURT: Just a minute. Is there anything more you had on this specific issue?

MS. MURLEY: No, Your Honor.

THE COURT: Could I hear from you on this, please, the plaintiffs.

MR. KELLY: Yes, Your Honor. So plaintiffs shared your concern that parents be given an opportunity to object

to separation from their children. And something that we note is that until we receive this JSR even though we'd asked for this information at meet and confer, we'd never heard of this process. So we'd like some more information about what this process is and whether it actually does do all of the things that have been represented. We just don't have information.

That said, we also note that the process referred to by Judge Sabraw includes meet and confers with the ACLU where the ACLU has the opportunity to challenge whether someone is appropriately removed or appropriately not part of the class. And so that seems to be a much more collaborative process. We don't know whether that's happening. We don't have that here in this case yet.

However, plaintiffs would agree that as long as the collaborative process continues in the *Ms. L* case and as long as the Government continues to abide by what is described in Judge Sabraw's order, we don't have an issue with you incorporating that order. That addresses our concerns.

THE COURT: Thank you, Mr. Kelly. What about -- is that consistent with what you've just told me?

MS. MURLEY: I believe so, Your Honor. I just want to --

THE COURT: Including the meet and confer issue --

MS. MURLEY: That is all happening in Ms. L. I want to be really careful that we keep these cases separate so that we're not creating a situation where the constitutionality of the separation that is very much at issue in that case is not brought into this case, which is a much different issue.

THE COURT: I understand. I think what I'm trying to -- well, I don't want to repeat. My concern is that the parents have an -- a parent has an opportunity to provide input in connection with the decision being made about whether that parent should be separated from that parent's child. There's a process like that in place in the Ms. L case. In order to avoid confusion and potential conflicting processes, I'm just saying adopt here -- I mean, just embrace here what you've done there.

MS. MURLEY: Yes, we could do that. What I'm concerned about and maybe would like the opportunity to brief is that we don't have dual obligations on the same issue. Where we wouldn't be reporting here -- we're very much involved with counsel in Ms. L on these issues and we have a process in place there.

THE COURT: No, I'm not looking to do that. I just want to make sure that the members of the class here have the --

MS. MURLEY: They're the same class. I mean with

the exception of the small caveat, it's the same class. It's the same individuals. They are treated the same.

THE COURT: I think everybody's really in accord that that works. Now the issue you've now just raised about -- concerning whether your communications would be limited to counsel for the plaintiffs in Ms. L, I think that was the next question.

MR. KELLY: Your Honor, our concern is just that the plaintiffs who are identified in the Ms. L case also get the relief here.

So to the extent that someone is identified as a class member there, they have the opportunity -- there is the -- sorry. After there's the meet and confer between plaintiffs and defendants in the Ms. L case, if someone is determined to have been wrongfully separated from their child after that opportunity which apparently is what's happening according to Judge Sabraw's order, that that person, once they're included back into the Ms. L class, also be part of this class and receive the relief here.

So we want to make sure that somebody is actually -- that it's not just the process but that somebody's looking at this process and making sure that it's being enforced.

MS. MURLEY: If I could, Your Honor. The reason we brought the question to the court in November in the

first place was because we wanted to keep the classes consistent. And so to the extent that we've identified Ms. J.P. class members, they are coextensive with the Ms. L class. And we were looking for to keep the class the same and not have a broader class here that didn't comport with there very much for the reasons that plaintiffs' counsel has just identified.

One, because it's much easier for the Government to have the same class and identify the same people rather than having a small subset that is different here. So maybe we can make language that the classes are identical for the purposes of relief in this case -- that the language would be sufficient to say that the classes are identical for the purposes and they're entitled to -- the same individuals are entitled to the relief in the Ms. L class here.

THE COURT: All right. Just a minute. One moment.

And this may be a broader instruction than I'm going to give it now to you, but what I'd like you to do is to confer and see if you can agree on this language and submit a proposed order -- or stipulation and proposed order if you can agree.

If you cannot agree on the language, then what I'd like you to do is have the Government submit -- the parties to submit jointly the Government's proposed language and

then showing a red line as to how the plaintiff proposes to modify it.

But I think that would be -- I'm optimistic you'll reach an agreement because I don't think you're that far apart, if at all. And if you are, I'll look at the words. And I think that's the more efficient way to do this. Do you agree with that?

MS. MURLEY: I do, Your Honor.

THE COURT: Do you think that will be efficient?

MR. KELLY: Yes, Your Honor. Thank you.

THE COURT: Thanks.

With respect to the issue -- you've referred earlier to ORR, and I think that again it's -- I think it's appropriate to defer to the discretion of the ORR to provide the necessary services --

Just a moment, please.

Just a minute, please.

To the extent that there's a child in ORR, the custody of ORR, the care of ORR, and the parent is elsewhere because ORR would be only minors, I think again -- what is appropriate I think -- it's appropriate to leave that within the discretion of ORR, but I don't think that would preclude, for example, ORR from concluding that some form of communication between a minor in its custody, care and the parent or parents of that minor would be appropriate.

Now, how that communication might occur again would be something that ORR could consider. If the parent and the minor are thousands of miles apart, a physical meeting may be challenging. If they're very close, it may be something that ORR would think would be appropriate. If not, as opposed to no communications, ORR might conclude that telephonic or video communications if available might be appropriate, but I would leave it within the discretion of ORR, but not preclude it or feel that it's precluded from concluding that some form of these -- one type of this communication might be appropriate.

MS. MURLEY: Your Honor, for all children in ORR care, they have weekly -- I think it's biweekly telephone calls with parents. A lot of -- just for clarification, the majority of children that come into ORR custody are unaccompanied alien children who enter the United States without a parent or guardian.

Oftentimes, those parents or one parent may be in the country of origin and ORR already has processes in place where those children are able to communicate.

If there is a sponsor who is identified in the United States who is going to fill out a sponsor application or also facilitates conversations with that individual, one, for the child to have those conversations; but two, to assess as part of the assessment process to make sure the

sponsor is a suitable sponsor for the minor who is in ORR's care. So that is already in place.

THE COURT: The question I have -- let me ask you this question: I don't think there's going to be -- here's the question: ORR's procedures as you just described them involve communications, the opportunity for communications between minor and adult.

MS. MURLEY: Yes.

THE COURT: If in the course of providing care, the care provider determines that such communications would be appropriate, that seems to be a slightly different point. It's not to say -- if you're with me -- because then the issue is is what is currently going on, which is this type of communication consistent with what's being recommended by the care provider and that can reasonably be provided.

So, in other words, just saying that ORR has a standard protocol where there can be communications between parent and -- or adult and child doesn't necessarily mean that ORR is agreeing or being directed to exercise reasonable -- take reasonable steps to implement the recommended treatment by the care provider including potential communications between parent or adult and minor.

MS. MURLEY: One second, Your Honor.

ORR would be okay with facilitating that, Your Honor.

THE COURT: Thank you.

MS. MURLEY: I just wanted to point out, the parties were in agreement that the actual ORR procedures were not part of this case too.

THE COURT: Let me hear from you on this.

Mr. Kelly.

MR. KELLY: Your Honor, our understanding was that the Government had agreed that if the mental health care professional offered to the parent said that it was appropriate for the parent and child to receive therapy together under the relief in this case, that ORR would make that happen. That was our understanding.

So I think the only issue -- so that's an agreement, and I think the only thing that was at issue in the joint status report was whether the other children who entered who were not children of class members would be affected by this order.

And plaintiffs' position -- I believe the defendants just clarified their position as well -- is that the other children in ORR care who aren't the children of class members aren't affected by Your Honor's order. And I believe that that is the issue.

THE COURT: What's the disagreement?

MR. KELLY: Initially, the Government had asked for clarification from Your Honor that -- the Government had

asked for clarification from Your Honor that Your Honor's order did not cover children who were not children of class members and that was -- and so they raised that. And our point was that they weren't covered by the order, but that is an issue that is before another court.

THE COURT: No, I agree with you, they're not. I agree with you, they're not. I thought there was some further -- well, I just clarified it. Maybe I misunderstood. I thought there was some issue concerning the ORR care that would be provided to children who are children, who are minors, of members of one of the subclasses in terms of communicating with their parents.

MR. KELLY: Our understanding from the Government's statements at the last hearing and the Government's joint status report is that ORR will make those children, to the extent recommended by the mental health care professional, make it possible for there to be joint family sessions.

THE COURT: Do you agree with that?

MS. MURLEY: Yes, Your Honor. With one caveat, there may be scenarios where it's via telephone or via -- or where there's things that may have to happen where it's not possible. We may also have a situation where there's children who are not reunited with a parent who may have been released for reasons that is within ORR's statutory

authority.

THE COURT: I think I referred to that -- the former earlier. If the two are thousands of miles apart, a physical meeting may not be reasonable.

Again, I think it would be helpful if you could submit, as part of the proposed order, do the same thing on this issue. And, once again, if there's a disagreement, give me the red line.

MS. MURLEY: Yes, Your Honor.

MR. KELLY: Thank you, Your Honor.

THE COURT: Thank you. If I've misunderstood the issue, you'll tell me. Not this issue, the next one.

Then, there was an issue as to whether certain members of the release subclass are within the transitional period or whether that would exclude individuals who are no longer in removal proceedings, individuals who acknowledge having received the mental health screening and treatment and individuals who acknowledge having had access to mental health screening and treatment whether or not they took advantage of it; and I think there is -- I believe the dispute is about those who are no longer in removal proceedings. Is that correct?

MR. KELLY: No, Your Honor.

THE COURT: What's the dispute?

MR. KELLY: Sorry, Your Honor. The dispute,

Your Honor, is that these four categories that the Government has provided are essentially class removal categories. They're going to kick people out of relief before any relief at all has been offered to any of the subclass members. I take, for example, request number four which is individuals who acknowledged having had access to mental health screening and/or treatment. The Government has previously argued that due to the provision of some form and the possibility of requesting treatment, they've argued that that would include every single one of the class members in their papers.

And so what this would do is essentially negate relief to anyone in the class by defining the transitional period so broadly. Your Honor, on page 46 of your order, said that "transitional treatment shall be provided until those members of the release subclass, through reasonable good faith efforts, and with the assistance of plaintiffs' counsel, are able to locate and enter the care of other adequate health service providers."

And so we believe that that is how the transitional period should be defined, and we think that is defined in Seneca's proposal. We think that the transitional period should be understood to be what is in Seneca's proposal, and that there should not be additional factors grafted on to Your Honor's order to exclude

significant numbers of people from the class.

THE COURT: Okay. Let me hear from you on this, please.

MS. MURLEY: Your Honor, we've read the Court's order with regard to the release subclass as being subject to certain limitations. And defendants, in response to the Court's order proposed limitations. The Court's order on page 42 says that with regard to the release subclass will necessarily be subject to certain limitations in light of the issues discussed above, and the order goes on to say, "these include but not limited to the length of the transitional period after release, the location and identities of the release subclass, the willingness of the release subclass to participate in Government-sponsored mental healthcare and the appropriate nature, scope and implementation of the relief."

So with regard to the transitional period, the Government proposed that the biggest group of individuals would be those removed from the country, and I think the parties are in agreement on that issue. I think there's one caveat. And to that end, we had proposed -- there's other language. We put this forth in our portion of the joint status report where the Court seems to limit the relief to those individuals who are still in some form of removal proceeding, which is the basis for the removed individuals

to not be eligible for the relief.

So we were suggesting and we proposed limitations. We're not seeking to -- despite plaintiffs' claim, say that everybody that's been released would of had access to mental healthcare, we're not proposing to do something different than what Seneca has proposed but instead in the notice that there would be some questions to ascertain relief eligibility.

THE COURT: Just a minute. Is it the Government's position that a person who's in the subclass as defined, not in the custody subclass but in the released subclass and who is no longer in removal proceedings -- okay -- but has never received any treatment at all -- never received any treatment, would be ineligible to receive any transitional treatment?

MS. MURLEY: I think that would be our position based on the language in the Court's order. Those are the final orders of removal.

THE COURT: Excuse me. You're interpreting -- your statement about no longer in removal proceedings, meaning they're in the line to be deported --

MS. MURLEY: Yes.

THE COURT: Just a minute. Is there something you wanted to add?

And, by the way, if you want your clients to sit

here, they may.

MS. MURLEY: I think another question is individuals who have -- are in proceeding -- are finished with proceedings and have obtained relief, so they're eligible to remain, I think. But those are separate questions. I think individuals with final orders and individuals who have obtained --

THE COURT: Well, an individual who has obtained the relief has obtained the relief that's required by the order.

MS. MURLEY: By "relief," I mean asylum, or they have been granted --

THE COURT: Let me make sure -- let's talk about two things. One would be that sub group and the other would be the group where the removal proceedings have been completed, but they've not yet been removed from the United States.

MS. MURLEY: Yes.

THE COURT: My question is similar. Well, let's start with those who are still in custody waiting to be removed, but haven't yet been removed.

MS. MURLEY: Yes.

THE COURT: And that may take an unspecified amount of time.

MS. MURLEY: Correct.

THE COURT: And my question is if a parent is in that queue which hypothetically could be 30 days, 60 days, 90 days or more, and it's been recommended that that parent have some opportunity to communicate with the parent's child to facilitate the issues we have here, is it your position that that parent would not be eligible to have that opportunity?

MS. MURLEY: If they had a final order and were slated to be removed?

THE COURT: Correct.

MS. MURLEY: That's how we read the Court's order.

THE COURT: With respect to those who have been granted asylum, so they will be staying?

MS. MURLEY: Yes.

THE COURT: Same question. If such a person is no longer in any kind of detention, but once again has received no mental health services, is it your position that they would be -- that under the order they wouldn't be eligible to receive them?

MS. MURLEY: The way I read portions of the order is that the relief is tied to being in the duration of the proceedings.

THE COURT: All right. That's helpful. Thank you.

Mr. Kelly.

MR. KELLY: Your Honor, there were two legal bases for your order as, of course, you know: The Special Relationship Doctrine and the State-created Danger Doctrine. We believe that the transitional period and the portion of your order related to whether the person is still in removal proceedings entirely stems from the Special Relationship Doctrine and not from the State-created Danger Doctrine.

Our reading of the Court's order and of the case law in that area is that relief should be provided to all class members under the State-created Danger Doctrine because the Government caused this harm and should therefore provide the relief necessary to remedy that harm.

Also, Your Honor, we would note that these limitations that the Government has proposed would eventually become a self-fulfilling prophecy in that everyone in this class is an asylum seeker, so either they will ultimately be removed from the country or they will ultimately receive asylum. And at that point, it seems to me the Government's argument that they should not get relief under Your Honor's order.

And we're already several years from when the case was filed. We're 13 months out from the first discovery to which we've gotten one document. Seneca has not been retained by HSS yet.

And so far, no one has gotten any relief under

this order, and we don't want to get to the point where the entire class -- where there has been sufficient delay that nobody ever gets any relief.

And we're afraid as we keep limiting the class and as we keep shortening the transition period, that's what is happening.

First, we don't think the transition period applies because of the State-created Danger Doctrine. And second, we think that Your Honor's order can't be made a nullity just by waiting it out.

THE COURT: Just a minute.

Mr. Kelly, with respect to the time between the issuance of the order and now, if there were a time period when a person had been in the process seeking asylum but hadn't yet received asylum or there was a process pursuant to which a person was in the process of removal but a removal order hadn't yet been issued, would he or she be eligible in your view for treatment?

MR. KELLY: I believe that the person would be eligible for treatment at any time until they're actually on a plane outside of the United States.

THE COURT: Do you agree with that?

MS. MURLEY: Could you repeat the question, Your Honor?

THE COURT: Would you repeat my question please,

so I don't state it differently.

(Record read.)

MS. MURLEY: Yes.

THE COURT: So you agree on that. And some of this then turns really on a fact questions, and that is to say are there people in a class -- are there class members in either of these categories who did receive -- have received -- did receive treatment during the time period from the order till now or until and have since, excuse me, not now, but sometime between the order issued and a point when they were either ordered removed or ordered to have asylum, has there been any treatment to those or has no treatment yet been provided to anyone?

MS. MURLEY: No treatment has yet been provided because of the outstanding issues, so there hasn't been an agreement on how that would be done. I take issue that we have been dilatory. We've been moving forward with the contracting process.

THE COURT: I'll reflect further on this. Let me ask you this, Mr. Kelly -- let's just talk about the persons who -- the class members who between the issuance and the order and now have received an order of removal. It's your position that between now and they actually are removed, they would remain eligible to receive services?

MR. KELLY: Yes, Your Honor. These are people

whose children were taken from them and both they and their child would benefit from mental healthcare.

THE COURT: And with respect to --

Do you disagree with that?

MS. MURLEY: Yes. Because we read the Court's order as placing that limitation. And one of the reasons for the suggestions and our positions in the JSR is because we read the Court's order as having open questions regarding the transitional period and what is considered a reasonable transition period.

THE COURT: All right. Just a minute.

Do you have an estimate of the number of class members who have received removal orders since the issuance of the order?

MS. MURLEY: I don't, Your Honor. I don't know -- I would say there's a fair number that are still in proceedings and some that have final orders of removal. We have class members who have been removed and come back. We know that.

THE COURT: Okay. Just a minute.

I understand. I'll evaluate this further. Your comments today have been helpful. And I take it, just to be clear, about the dispute, to the extent that a member of the class has received an order since the time my order issued, a member of the class has received asylum, the plaintiffs'

position is that person would remain eligible for these services; correct?

MR. KELLY: Yes, our position is that we think that the plaintiffs would remain eligible, that they need the services. And we would also point out that for people who are able to receive these services, we don't believe there's any prejudice to the Government in providing them.

THE COURT: I understand. And do you have any estimate of the numbers?

MR. KELLY: No, Your Honor.

THE COURT: Just to be clear, the Government's position is again different. You believe that the order would not require the Government to provide these interim services upon a time that a member of the class is granted asylum; is that correct?

MS. MURLEY: Yes. At the end of the removal proceeding. Because a person who is applying for asylum is in removal proceedings until the asylum is granted.

THE COURT: Okay. I understand. All right.

MR. KELLY: Your Honor, two points. First is that Your Honor asked several questions about numbers, and I think that those are important, but I don't think we're going to know those numbers until the contract is fulfilled.

And there's also a different group of people at issue which are people who have applied for asylum, have had

that denied and are not appealing that. So that's a different group of people as well.

MS. MURLEY: One clarification. For the purpose of this case, the way we're defining the transitional period, those individuals would still be included in the class. Even though they would have a final order, it would be on appeal either at the border or at the Ninth Circuit or a different circuit court.

THE COURT: Thank you. I think the only other area of dispute is the protective order. Have I overlooked any issue in which you have a dispute?

MS. MURLEY: No, Your Honor. I think we've addressed them all.

THE COURT: Mr. Kelly, is there any other matter disputed other than the protective order?

MR. KELLY: I don't believe so, Your Honor.

THE COURT: All right. Thank you. Here's what would be helpful to me, I've already stated, please submit a proposed order where you disagree. If you would include in that this last disagreement even though it's not quite the same red lining process because you have fundamentally different views, but just give me your proposed language. So I'm clear what outstanding disputes there are.

Can you do that?

MS. LALLY: Your Honor, given some of the issues

the parties have had on timing, when would you like this submission, Your Honor?

THE COURT: How long do you think you need?

MS. LALLY: You've asked defense to go first. They can propose a date, and I would propose that we would then respond within three days; and then it would be filed immediately thereafter without further changes.

MS. MURLEY: Tomorrow's a travel day for us, so we won't be able to work on this. Would seven days be appropriate?

MS. LALLY: So the 21st, or 20th?

MS. MURLEY: Could you give us the 21st? There's a holiday weekend -- excuse me -- I understand that seems like a long time, but there are four different client entities that have to sign off on anything we do.

THE COURT: Is your proposal, then, that the joint filing would be made one week from tomorrow?

MS. MURLEY: Excuse me, Your Honor, yes. No, sorry that we would give plaintiffs our submission one week from tomorrow.

THE COURT: I see.

MS. LALLY: So that would be a Friday, so then Tuesday, the 25th, we would add our portion without making any changes to the Government's portion --

THE COURT: Here's what I'd like you to do. What

I'd like you to do is this, just to minimize the possibility or my having to address disputes which aren't disputes, the Government should provide by noon Pacific Time on the 21st its proposed language. The plaintiffs should by noon Pacific Time on the 25th respond with how you propose to red line the Government's change.

The Government should then determine by noon Pacific Time on the 27th whether there's -- having -- conferring with counsel to have a final version of what's disputed and then file it on the 28th.

Okay. Can you do that?

MS. MURLEY: Yes, Your Honor.

THE COURT: That would be helpful.

MS. LALLY: Yes, Your Honor. Thank you.

THE COURT: Are you all right? Do you need a break?

MS. MURLEY: No, I've just had a lingering cold, Your Honor.

THE COURT: With respect to the protective order issues -- just a moment.

The first one concerns paragraph 15, the use of information in the public domain, and I -- my tentative view is I agree with the Government's position that it's appropriate not to provide expressly as to if something's in the public domain or obtained through lawful means that it

can immediately be or it's no longer subject to the protective order, because I think that could invite unnecessary litigation.

Meaning, if the -- under the protective order, once it's entered, any party can always seek relief. Parties can seek relief to modify the protective order, a party can seek to challenge another party's designation as to what should or shouldn't be protected, a party can raise the issue as to this should no longer be protected because it's now in the public domain; it's been published.

I think rather than potentially have a dispute after the fact as to whether or not something fit into this category or it's in the public domain, I think it's a better process for you to not have that in expressly, but obviously it's there. I mean, it's a matter of law. If something becomes public, then certain issues are raised as to whether it should any longer be restricted by the protective order. But I don't see this as a major issue.

Mr. Kelly.

MR. KELLY: Your Honor, there is one thing that we wanted to clarify, which is the way that we read the provision is our concern is that at the point when defendants began producing documents, we find something or we read an article in the New York Times and we cite that New York Times article to Your Honor and then defendants

come into court and say, "You violated the protective order because the subject of that leaked to the New York Times" was something that had somehow been produced under the protective order and marked confidential. What plaintiffs don't want to have to do is guess everytime we read something in CNN or the New York Times or various public sources about whether somewhere in a massive production there might be something that was allegedly the source of that link.

So we're more than happy to follow Your Honor's thoughts, but we do want some protection that if we do read an article and cite it that we're not going to be held to have violated Your Honor's protective order.

THE COURT: I see. Just a minute.

Limited to the issue of something that's been published in a legitimate publication, in other words -- let's just talk about that. If a news article from a legitimate news source is quoted and has information that may -- first, information that the Government also produced in this case under the protective order, would the plaintiff be precluded from presenting that article?

MS. MURLEY: I don't -- I think we're talking maybe about two different things. There's a fine line between citing a newspaper article that has -- quoting a source or something and a newspaper article as referenced in

the case law that we've submitted here that's explicitly references leaked documents that were known to be stolen things or known to be taken from a Government agency. Things that are not properly in the public domain, we cannot agree to their use in this case as evidence.

THE COURT: Again, I think this is something of an academic issue because to the extent that you're going to be -- the plaintiff would hypothetically be citing a news article, which is at least one if not more levels of hearsay, I'm not sure what power that evidence would have.

MS. MURLEY: I agree. I think the question is the underlying documents. Like a WikiLeaks scenario, we can't agree to that.

THE COURT: Just a minute. Is there something you wanted to add?

MR. KELLY: Yes, Your Honor. In this case, already we have had to cite public news articles because that's the only information we've gotten and Your Honor yourself cited public news article. And at a certain point, we feel we may well have to do this again, particularly since the newspapers keep coming out with statements -- with articles about how more and more children are separated from their parents.

And that's the sort of information that we expect to need to cite in this case going forward; and that's the

kind of thing that we don't want to come into this courtroom and be told we violated a protective order because CBS has published that more kids have been taken.

THE COURT: Just a minute.

Well, my view is this: I understand your positions, and as I started out with my comments, modifications to a protective order can be made.

Further, there's relief available in terms of requesting that if some particular document that's been produced by either side and with the identification as it's being subject to the limitations of the protective order, the receiving party of that document can also seek relief with respect to that document.

So I think that the better way to address disputes on this is not to try to craft the language now that might perfectly identify circumstances in which a document that was produced and marked as confidential under the protective order can be used by the receiving party because it's in the public domain, which I think is a different issue than whether a newspaper article or some other reasonable publication can be produced. I think the right way to do this if it becomes a significant issue, then work with Judge Kim on how promptly to resolve it without having to necessarily bring a motion.

So to be clear, I don't think that -- it's one

thing if a party were to attach to a brief and file it on the public file on the docket a document produced by another party that was designated under the protective order as confidential and did so without any communication with the producing party as to whether there's an objection to having it in the public docket.

That's different than you alluded, Mr. Kelly, attaching an article from a recognized news source, quoting the news article. And that's also different than obtaining -- the same document becomes available through some other means, it's different than again attaching the document that became available through the other means.

I think the way to handle this is what I said. I think it's harder to parse out all the hypotheticals in the protective order by including this language, and I think the better way to do it is what I stated, is to -- recognizing that the protective order can be modified, recognizing that a designation of the document is confidential under the protective order is not a definitive determination by the Court as to whether it should be. I think these changes are appropriate.

Has this issue come up? Have you actually had a dispute on this?

MR. KELLY: Your Honor, we did not. We have not received any confidential documents, other than the class

list, so no.

MS. MURLEY: No, Your Honor. The Government cannot agree to use -- we can't consent to the agreement of leaked information in this case, or information that was stolen from the Government.

THE COURT: I understand. But again, there's a hypothetical there if information were stolen or the Government contends it was stolen and it's now been widely distributed across the world, the question would become: Well, is it still appropriate to restrict it under the protective order? I can't say. Without knowing the facts, I can't say.

Just a minute.

You also have a dispute on paragraph 26 about the use of information subject to the protective order and whether it should be restricted to use in this litigation. It's a similar dispute, frankly. We could craft language that say, provided, however, this is without prejudice to an application by either party for leave to submit some disclosure for purposes other than this litigation. But you already have that right. So it's a similar thing. I think this is something that's better adjudicated in the context of a particular dispute.

Mr. Kelly.

MR. KELLY: I'm sorry, Your Honor. Seeking

clarification on that. So would your proposal be to include the language and then have the Government -- sorry, there aren't two different versions of this language. Plaintiffs are requesting the language and the Government is not, and I'm just wondering whether Your Honor is suggesting including the language or not.

THE COURT: Well, what I'm saying is it could be included but the use in this litigation, but it's the same issue that I think we had a minute ago in a different context, meaning it may be appropriate for the information to be used for reasons other than this litigation putting aside Ms. L, for example. Let's put that over here. But there may be, and I think that's something that could be determined based on application.

MS. MURLEY: Your Honor, we read the language that plaintiffs have proposed as restricting our statutory function under our obligation to share as law enforcement agencies information that we have obtained, and we cannot ignore those statutory functions.

DOJ is a law enforcement agency, DHS is a federal law enforcement agency. If it comes to light in the litigation, we have reason to be concerned. ORR has reporting requirements if we find out that there are abuse issues or criminal issues.

So those are all things that the Government has

secondary or, I would say, primary obligations upon receipt of this information that we cannot ignore.

MR. KELLY: And, Your Honor, plaintiffs would say that in that situation, which we don't expect to arise, the Government should file a motion asking for the document to be marked nonconfidential. And we think this is a very unlikely event to happen, and the Government can very easily say: This document, we believe, is a crime or this document is -- they mention terrorism repeatedly in their papers. I seriously doubt we're going to wind up with terrorism in a case where we're trying to provide mental healthcare to people. But to the extent that those documents do come up, the Government can very easily apply to Judge Kim who has -- they can ask us, and then they can then apply to Judge Kim who has an informal process. This can be handled very readily, very quickly, through that application.

THE COURT: What about that approach? Including the possibility of an in camera request to the extent that the Government contends that a particular document's disclosure to anyone would be prejudicial.

MS. MURLEY: We don't think that the Government should be restricted from in a protective order carrying out its statutory functions. We have obligations. I would point the Court to the *AOL* litigation, the case that we cited that found similar language unduly restrictive and

that the Government could not be bound in a way that is contrary to its statutory functions.

MR. KELLY: Your Honor, we would note that this is a standard provision and the Government has, in multiple cases, agreed to it, including *Ms. L.* And it's a standard provision in Judge Kim's protective order. And so the statement that the Government can't bind itself to this is gainsaid by the fact that the Government has bound itself to this in multiple other litigations. And then when they've tried to change it, the Tenth Circuit has held that they can't. That's the *SEC v. Merrill* case.

So we would submit that the appropriate way forward here is, to the extent there's any documents that arise, the Government should make a motion.

THE COURT: Okay.

MS. MURLEY: I would like to make two points. With regard to the protective order that was entered in *Ms. L*, that was for a different reason. That case is in a very different procedural posture. The information exchanged in that case is exclusively for the purposes of carrying out the injunction in that case. It consists of data. There has not been a 26(f), there has not been any request for documents. That protective order was entered into with the idea that we would enter into another protective order when we reached the discovery phase.

The second point I'd like to make, and I'd like to highlight the *Otro Lado* case where the Court found that it agreed with the defendants to the extent that the language proposed by the plaintiffs, which does not allow for any intra- or intergovernmental sharing of confidentially designated information, is unduly restrictive when balanced against defendants' law enforcement-related interests from particularly the mandatory disclosure requirements of IRTPA. We can't be bound to not share our own information.

MR. KELLY: Your Honor, first off, the protective order explicitly says that the parties can do whatever they want with their own information. And, second, plaintiffs are not asking for a permanent ban on this information being used outside the litigation. They're asking that before information is used outside the litigation that the Government has to come to this court so that we're not winding up in a situation where people are going out trying to offer mental healthcare to someone and that person refuses the healthcare because they're afraid the information will be immediately turned over and used to deport them.

We are very concerned that by not at least forcing the Government to move this court to allow this information that we're going to wind up having the very difficult task of reaching these people and offering them this healthcare

become an impossible task because people will hide from us because they're going to be afraid that we're just passing everything to the Government.

THE COURT: Just a minute.

If hypothetically a minor is being provided treatment by a Government through the Government process and the person who is working with the minor hears from the minor something that that person under that person's professional responsibility, obligations, whether by code of responsibility or statute in some states, is obligated to disclose. Are you with me?

MR. KELLY: Yes, Your Honor.

THE COURT: So under those facts, would that mean that under this order that person couldn't fulfill that person's disclosure obligation?

MR. KELLY: Not at all, Your Honor. That piece of information would never be produced by plaintiffs. Plaintiffs would never mark that protected material and that is something that the treatment officer would immediately report to their superior. That would never become a piece of information in this litigation. The person would follow their professional obligations.

What we're talking about is the information that is produced by plaintiffs in this litigation. This is not that situation at all.

MS. MURLEY: Just to clarify, information received by Seneca would be information received from a Government contractor at that point to the Government. We would not be restricted. That would not be information that was produced to us by plaintiffs.

THE COURT: Well, again, I think -- I mean, I've looked at -- I'm mindful of the various cases that have been cited here, many of them district court cases. There's also appellate authority on this. I think this is one where the more straightforward outcome is to do what I said at the outset, and that is to adopt this language provided; however, this is without prejudice to the application by a party for leave to admit disclosure for purposes other than this litigation, including an application that's made for in camera -- made in camera if justified.

Because that way -- just on a practical level, Judge Kim, if this comes up at all and it comes up more than once, I think Judge Kim will then have a good database in which to make a determination as to whether the order should be modified. It's not a determination that I'm disagreeing with the Government here, it's a determination similar to the one that I made as to the other provision. I think the better way to resolve this dispute is in the context of something that actually happens.

MS. MURLEY: Yes, Your Honor. Just one

clarification. So this clause, if left in the protective order, applies solely to information produced to defendants from plaintiffs?

THE COURT: Correct. That's what it says.

MS. MURLEY: And not information that we could have obtained from another source or --

MR. KELLY: With a slight qualification. It's information that you -- it doesn't apply to information that you did obtain from other sources, it would apply to information that you received from plaintiffs but could have gotten from other sources. But I think that's what you meant. So information from Seneca would not be covered by --

THE COURT: Again, we can come up with other hypotheticals, but I don't think we need to. Again, my determination here is a procedural one. It's how best to resolve the dispute. I think the best way to do that is in the context of actual disputes.

As I've stated, if hypothetically there's a national security interest that warrants an in camera filing, it could be made in that sense and then Judge Kim, if it's challenged, Judge Kim can be asked to make a determination as to whether it should remain in camera.

MS. MURLEY: Yes, Your Honor.

MR. ROSENBAUM: Your Honor, could we get a

clarification, please.

THE COURT: Could you stand when you speak.

MR. ROSENBAUM: It's not clear to me from the Court's discussion whether or not information that is obtained by Seneca is going to be information that the Government can willy-nilly turn over. If that is the situation, then that's going to frustrate or make impossible Seneca talking to individuals and saying, you know, this is not going to end up in the Government's lap or be used for removal purposes.

MS. MURLEY: I understood plaintiffs to say that it would not be information that was covered by this paragraph. I mean, that's what I thought they had just said. One. Two, there would be no restriction because we can do what we want with information obtained by our contractors.

THE COURT: Go ahead.

MR. ROSENBAUM: I think that is going to undermine the capacity of any mental health professional to obtain information and provide appropriate therapy, and I think the suggestion that the Court started with, which is let's take this on a case-by-case basis, let's make a determination as to what the need is.

But the first question that Seneca is going to be asked is: If I tell you something, could this be used for a

removal purpose, particularly, in light of the earlier discussion today where there are ongoing proceedings. That's the first question that is going to be asked.

THE COURT: Just a minute because I think this is a different dispute.

MR. ROSENBAUM: I just want to get it clarified.

THE COURT: I can't clarify something that isn't part of this dispute. This dispute concerns information that's produced by one party to the other and how it can be used. That's different than if a member of a class communicates with a mental healthcare provider, what restrictions are placed, if any, on that mental healthcare provider's ability to share that information. That's a different issue.

MR. ROSENBAUM: I take Your Honor's point, but I do want to make sure that this is clarified because this could be toxic to the whole process.

THE COURT: I thought you had talked about this issue.

MS. MURLEY: It was my understanding -- what we're talking about right now does not cover Seneca information.

THE COURT: I understand that. But I thought there had been a discussion about the use of information that might be provided by class members to healthcare providers.

MS. MURLEY: I don't know that the Government -- there are reporting requirements built into the contract where information should be shared, and I think -- I don't have it in front of me at this point.

Give me one second.

MR. ROSENBAUM: I appreciate the Court taking consideration of this because that's privileged information, and it's the guts of the whole process.

MS. MURLEY: We would be getting not reports of the actual sessions. It would be statistical reporting requirements: Names, what individual class members had availed themselves of the relief, who had not.

THE COURT: I think you need to talk more about this one because, as I stated, the issue here is different than that. What I would request you do is to confer further with respect to what, if any, restrictions would be placed on information provided by a class member to a healthcare provider pursuant to the injunctive order.

And again, it may be that it's challenging to identify what limitations there might be. A healthcare provider receiving certain information may have a statutory or professional obligation to disclose it to someone. Other information, they may not have that obligation. I think this is something you need to think through.

MS. MURLEY: We need reporting from the Government

contractor to carry out the functions of the contract.

THE COURT: No, I understand that. I don't think the issue is whether everything that's communicated by a class member to a healthcare provider cannot be disclosed to any other person.

I think the concern that's being expressed by the plaintiffs is hypothetically, if a person is being asked -- if a member of the class is being asked questions as part of a healthcare process, will that person be open and available -- willing to provide information that would assist hypothetically the healthcare if the person fears that that information would be adverse to that person's interest in connection with some other process and, therefore, would be hesitant to do so because it feels that information might be shared with others, including the Government. That's a different issue than this one.

MR. ROSENBAUM: I appreciate that, Your Honor. And it may be -- if we're talking about statistics, we don't have a dispute.

THE COURT: Again, maybe this is something -- until the care starts being provided, it's not yet at issue exactly.

MS. MURLEY: Your Honor, one point. With regard to the first issue of the protective order, paragraph 15, it's not clear to defendants what language -- whose language

you've adopted. I think it's defendants, but we're just seeking --

THE COURT: Correct. I would adopt defendants' language for the reasons I've stated, because I think this can be tested on a case-by-case basis.

MS. MURLEY: Thank you.

THE COURT: You're welcome.

I think the final dispute is about the clawback provision and the inadvertent disclosure of privileged information. What I'm inclined to do with respect to this dispute about paragraph 24, I'm inclined to adopt the plaintiffs' version of this because I think the principal difference is whether a receiving party has an obligation to review everything that's produced to it and then make its own determination as to whether there may have been an inadvertent production of privileged information.

I'm not persuaded that that's an appropriate or necessary requirement, but at the same time -- because, among other things, I think this could lead to a lot of disputes as to whether the receiving party knew or should have known that this was privileged and did the receiving party then file a brief referring to it in some fashion that is then challenged. And said, "Well, you must have known about it, yet you didn't fulfill your obligation to us to tell us about it."

I just find this unusually burdensome. It's more about process. If there are thousands of documents produced, my concern is that the receiving party shouldn't have the immediate burden to review everything to see if the producing party made a mistake. The producing party should do its best not to make a mistake. If the producing party makes a mistake, there's a remedy under the rules and the producing party would then seek that remedy.

MS. MURLEY: Your Honor, I don't read that provision, paragraph two, that way. It's my understanding this provision just details what happens if they come across information that they believe is privileged. If they come across attorney-client information, that they have an obligation to alert us.

And then it sets out -- in a case like this where we expect voluminous electronically stored information that having a clawback agreement that is more robust, that explicitly details what the parties are to do and sets out a mechanism for dispute and correction -- actually eases the burden on the Government for producing because we have so many governmental privileges that are at stake in this case. Where instead of one to two levels of review, if there's not an obligation to tell us if you see information that you think is privileged that it could slow down the process.

We've also had cases where we're talking -- where

we have such large volume of information, particularly in this case, about five different governmental entities that we're currently pulling in and searching, that the -- that turning over large swaths of information that may be privileged, to have a more robust clawback agreement in place protects that process and protects the Government's ability to identify those privileges and get that material back.

I will also add that plaintiffs raised the issue that we would -- it's like gotcha, where we've turned over information, we're about to use it, and then we claim privilege over that. We would not be turning over information that's privileged on purpose. It would be purely accidental or oversight or a screwup at the lab, which has happened. We think that the way the clawback order is written, the one we've drafted actually reduces the litigation because it is more clear, it sets out more standards for the parties to follow with regard to this information. And the focus is on flexibility under 502(d).

THE COURT: Mr. Kelly.

MR. KELLY: Yes, Your Honor. I would just point Your Honor to the comment, to 502(b), which is when it was adopted, they said: "The rule opts for the middle ground: Inadvertent disclosure of protected communications or information in connection with a federal proceeding. It

does not constitute waiver if the holder took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. And this position is in accord with a majority view on whether an inadvertent disclosure is a waiver."

Here, our real point is we don't know all of the various governmental privileges that the Government may or may not assert, and we can't go through a giant production and try and guess what they'll call subject to whatever privilege and then have to raise it to them saying: Maybe you might have meant this. We don't want to get into a situation where we cite something and it becomes: "Oh, wait, no, that was privileged." And under a privilege that we have not even had raised to us yet.

THE COURT: Let me ask you this question. If --

Just a minute.

Suppose that a document is produced that's received and reviewed and at the top it says "attorney-client communication privileged and confidential." If the plaintiffs' form of the order were adopted, there's no expressed obligation of the plaintiffs -- the plaintiffs or either party -- to do anything upon reviewing such a document.

Now, to be sure such a document, although it may appear to be privileged may not be. The party producing it

may have concluded that it isn't and so therefore produced it. But if there's something that is unsubtle and if the plaintiffs' proposed version of this provision is adopted, does that -- does the party that receives such a document have any obligation?

MR. KELLY: I believe we do under the rules of professional conduct, Your Honor. That's covered.

So if I see something that's attorney-client privileged or I think it is, then I'm obliged to segregate it and point it out to defendants.

But if I see something that may be some kind of deliberative process privilege that I've never even heard of before, I'm not going to know that.

MS. MURLEY: And I agree the opposing party is not going to know every Governmental privilege or which document, but I think that the way -- what this does is if even under the obligation under the rules, if that document is identified, this provides a procedure for which the parties are to follow.

THE COURT: What I'd be inclined to do is to add a section to plaintiffs' proposed paragraph 24 which refers specifically to the obligation that each side has under the rules of professional responsibility to notify the producing party if the receiving party under those rules has reason to conclude that a document was inadvertently produced

notwithstanding its privilege.

And, once again, my view is this -- I think that this is another one of those issues as you develop some experience with what's happened, it may warrant modification.

MS. MURLEY: I will add that the more robust 502 agreement is based on our office's experience with the inadvertent disclosure of privileged information which unfortunately happens a lot more than we would like. And we have adopted sort of as a policy a push for more robust because the way that has been written in the past has not been sufficient and has led to needless litigation between the parties.

I would ask that with the adoption of the Court's paragraph if that were to replace the obligation that the procedures in place for identifying that information, that we keep those because I think it makes sense to say if you dispute -- if plaintiff counsel identifies such information, what do we do then, how many days, when do we go to the court if they dispute the Government --

THE COURT: You're saying if in the exercise of fulfilling one's professional responsibility one receives a document that he or she thinks may have been inadvertently produced and you would have a time schedule for when that information should be transmitted to the producing party?

Any objection to that?

MS. MURLEY: And disputes over that information. That way, I think that actually reduces litigation over the issue.

MR. KELLY: Any objection to a time period after we identify it, Your Honor?

THE COURT: Just a process. In other words, it would say: Fulfill your obligations that you already have under the rules of professional responsibility to notify the producing party of a potential inadvertent disclosure and it can go on and say when that happens. If the producing party contends, yes, this was inadvertently produced and the receiving party disputes that, there's a method for resolving that expressly stated. I don't think that adds -- I think that would work.

MR. KELLY: That works for plaintiffs, Your Honor.

MS. MURLEY: That works for us too.

THE COURT: Fine. In light of what I've said today, put together a new version of the protective order, put it into that same queue, where you're going to talk about red lining in case you get to a dispute about particular language and then submit to me -- not necessarily agreed upon, but an order that you agree is consistent with my rulings. And then if there's a dispute about some particular language, show me a red line.

MS. MURLEY: Yes, Your Honor.

THE COURT: And can you do that on the same schedule as the other submission?

MS. MURLEY: Yes, Your Honor.

MR. KELLY: We can, and we will endeavor to do more quickly.

THE COURT: Thanks. I think those are the issues that we needed to address.

Did I miss anything?

MS. MURLEY: Not to my knowledge.

MS. LALLY: No, Your Honor.

THE COURT: Thank you for your help. I know you've said having a neutral assisting with any future disputes is not necessary. That's fine. If the parties at any point going forward believe that some further facilitative discussions about trying to resolve the entire dispute would be productive, then let me know. And we can see what bench officer might be available. Judge Otero is leaving the bench, but others might be available. So let me know.

MS. LALLY: Thank you, Your Honor.

MS. MURLEY: Thank you.

THE COURT: Thanks for your help today. Safe travels. I hope your cough gets better.

MS. MURLEY: Thank you.

(Thereupon, at 3:12 p.m., proceedings adjourned.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript format is in conformance with the regulations of the Judicial Conference of the United States.

Date: February 19, 2020

/s/ Lisa M. Gonzalez

Lisa M. Gonzalez, U.S. Court Reporter
CSR No. 5920